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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 58

LEE YOU FEE, by LEE Q. PON, his next friend,
Petitioner

v.

JOHN FOSTER DULLES, as Secretary of State

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming a judgment of the District Court for the Eastern District of Wisconsin, dismissing petitioner's declaratory judgment action to establish his American citizenship.

Opinions Below

The opinion of the District Court is reported at 133 F. Supp. 160 and is set forth at page 12 of the Appendix herein. The opinion of the Court of Appeals is reported at 236 F. 2d 885 and is set forth at page 17 of the Appendix.

Jurisdiction

The judgment of the Court of Appeals was entered on September 26, 1956. The jurisdiction of the Court is invoked under 28 USC 1254(1).

Questions Presented

1. Whether American citizenship acquired abroad at birth pursuant to Congressional enactment (8 U.S.C. 601-g) may be declared forfeit because a sixteen year old child born abroad on July 16, 1935, finds himself unable to return to the United States as a result of factors beyond his control.

2. Whether involuntary foreign residence prevents expatriation of naturalized citizens but not of citizens at birth.

3. Whether Congress may grant citizenship at birth to a child born abroad to an American citizen father and impose arbitrary conditions upon such citizenship (i.e.) that regardless of factors beyond such child's control, he must come to the United States prior to his sixteenth birthday.

4. Whether the requirement for establishment of residence in the United States prior to a person's sixteenth birthday was tolled for five years during World War II by reason of war conditions, lack of transportation, absence of an American Consulate in Hong Kong, and other factors which made it impossible to come to the United States during such period of time.

5. Whether the Immigration Act of 1952, 8 U.S.C. 1401(b) and (c), which now permits retention of American citizenship by those born abroad provided they come here prior to their twenty-third birthday and which expressly applies to those born subsequent to May 24, 1934, applies to petitioner or whether the savings clause (8 U.S.C. 1101 note) prevents the application of such age extension.

Statutes Involved

Section 201 of the Nationality Act of 1940 (54 Stat. 1138; 8 U.S.C. 601) provided in pertinent part for American citizenship for the following:

> "(g) A person born outside the United States and its outlying possessions of parents one of whom is a citizen of the United States who, prior to the birth of such person, has had ten years' residence in the United States or one of its outlying possessions, at least five years of which were after attaining the age of sixteen years, the other being an alien: *Provided*, That, in order to retain such citizenship, the child must reside in the United States or its outlying possessions for a period or periods totaling five years between the ages of thirteen and twenty-one years; *Provided Further*, That, if the child has not taken up a residence in the United States or its outlying possessions by the time he reaches the age of sixteen years, or if he resides abroad for such a time that it becomes impossible for him to complete the five years' residence in the United States or its outlying possessions before reaching the age of twenty-one years, his American citizenship shall thereupon cease."
>
> "(h) The foregoing provisions of subsection (g) concerning *retention of citizenship* shall apply to a child born abroad subsequent to May 24, 1934. Oct. 14, 1940, c. 876, Title I, Subchap. II, Sec. 201, 54 Stat. 1128."

(The foregoing sections were repealed by Section 403(a) of the Immigration and Nationality Act of 1952; 66 Stat. 279).

Section 301 of the Immigration and Nationality Act of

1952 (66 Stat. 235, 8 U.S.C. 1401) provides in pertinent part as follows:

"(a) The following shall be nationals and citizens of the United States at birth:

* * * * * * *

(7) a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than ten years, at least five of which were after attaining the age of fourteen years: *Provided*, That any periods of honorable service in the Armed Forces of the United States by such citizen parent may be included in computing the physical presence requirements of this paragraph.

(b) Any person who is a national and citizen of the United States at birth under paragraph (7) of subsection (a), shall lose his nationality and citizenship unless he shall come to the United States *prior to attaining the age of twenty-three years* and shall immediately following any such coming be continuously physically present in the United States for at least five years: Provided, That such physical presence follows the attainment of the age of fourten years and precedes the age of twenty-eight years.

(c) Subsection (b) shall apply to a person born abroad subsequent to May 24, 1934: *Provided, however*, That nothing contained in this subsection shall be construed to alter or affect the citizenship of any person born abroad subsequent to May 24, 1934, who, prior to the effective date of this Act has taken up a residence

in the United States before attaining the age of sixteen years, and thereafter, whether before or after the effective date of this Act, complies or shall comply with the residence requirements for retention of citizenship specified in subsections (g) and (h) of section 201 of the Nationality Act of 1940, as amended."

Section 405(c) of the Immigration and Nationality Act of 1952 (66 Stat. 280; 8 U.S.C. 1101 note) provides:

"(c) Except as otherwise specifically provided in this Act, the repeal of any statute by this Act shall not terminate nationality heretofore lawfully acquired nor restore nationality heretofore lost under any law of the United States or any treaty to which the United States may have been a party."

Statement

Petitioner was born in China on July 16, 1935, of an American citizen father. His mother, a Chinese citizen, died in 1945, and he was then entrusted to the care of relatives in Hong Kong. His father, his two sisters and a brother, who are American citizens, all reside in the United States (R. 20-25).

Petitioner reached his sixteenth birthday on July 16, 1951. He applied for an American passport in Hong Kong together with his brother and sisters several months later. In December of 1951 passports were issued to all but petitioner. His application was denied upon the ground that he had passed his sixteenth birthday and had failed to establish residence in the United States pursuant to 8 U.S.C. 601(g). (R. 21-24.)

In August, 1952, this suit was instituted for a declaratory judgment of citizenship pursuant to 8 U.S.C. 903. Petitioner asserted that his failure to take up American residence

prior to his sixteenth birthday was occasioned by lack of finances (R. 50) and his immaturity, as well as his lack of knowledge of such requirement. He also asserted that the statutory provisions should be tolled for the five-year period of World War II when consular facilities were unavailable and travel between the United States and China was prevented due to war conditions (R. 5).

The action was heard by the District Court upon cross motions for summary judgment. The District Court dismissed the complaint. The Court refused to toll the statute and held that neither lack of funds, sickness or other factors beyond a person's control prevented the operation of the statute because Congress had not expressly so provided (R. 48). The Court of Appeals affirmed for the same reasons (R. 56).

Reasons for Granting the Writ

1. Petitioner who was born in China on July 16, 1935, of an American father, became an American citizen at birth. 8 U.S.C. 601(g); *Lee Wing Hong* v. *Dulles*, 214 F. 2d 753 (C.A. 7, 1954). His citizenship, however, was subject to defeasance, *Hong* v. *Acheson*, 110 F. Supp. 60 (N.D. Calif. 1953), if he failed to come to the United States at the age of sixteen pursuant to 8 U.S.C. 601(g) or at the age of twenty-three if 8 U.S.C. 1401(a)(7) is applicable. The Courts below found that petitioner's failure to enter the United States prior to his sixteenth birthday, due to factors beyond his control, resulted in loss of citizenship. (R. 48, 56).

(a) The instant case presents to this Court for the first time the construction of Section 201(g) of the Nationality Act of 1940 (8 U.S.C. 601-g) and Section 301 of the Immigration and Nationality Act of 1952 (8 U.S.C. 1401-a-7). Whether these sections authorize the loss of American citizenship by reason of circumstances beyond the control

of a minor child raises an important issue under our citizenship laws.

(b) This issue is not only one of first impression in this Court under the aforementioned sections of the law, but it is also one which will control the disposition of many similar cases. The District Court observed that this was a test case and "one of a number of thousand cases" (R. 36).

2. From the days of our earliest expatriation laws, the cardinal rule of constitutional and statutory construction has been that American citizenship may not be taken away arbitrarily. *MacKenzie* v. *Hare*, 239 U.S. 299 (1915). This doctrine has been applied without qualification to native born citizens, *Acheson* v. *Maenza*, 202 F. 2d 453 (C.A. D.C. 1953); *Alata* v. *Dulles*, 221 F. 2d 52 (C.A.D.C. 1955); to naturalized citizens, *Mendelsohn* v. *Dulles*, 207 F. 2d 37 (C.A.D.C. 1953); and to derivative citizens born abroad, *Perri* v. *Dulles*, 206 F. 2d 586 (C.A. 3, 1953). The decision below, however, refuses to apply this principle to the case of a natural born citizen (8 U.S.C. 601-g; 1401(a)(7)) born abroad. It acknowledges that involuntary conduct can not cause loss of citizenship in the expatriation sections of the Nationality Act of 1940 (8 U.S.C. 801) even though there is no express statutory language requiring voluntary conduct. However, it declines to apply the same doctrine to loss of citizenship under 8 U.S.C. 601 upon the ground that it is not part of the expatriation sections of the statute (R. 60). The District Court states (with the approval of the Court of Appeals) that:

> "Title 8, U.S.C.A. 601, which is the statute applicable under these facts, is clear on its face. It makes no exceptions in circumstances of hardship, nor does it provide for any kind of adjustment in cases where a for-

> eign born citizen, such as the plaintiff, is faced with lack of funds or sickness. It seems that if Congress had wished to make any exceptions, it would have included them in the law which it enacted." (R. 48)

A contrary view, in consonance with the principle that only voluntary conduct shall result in loss of citizenship, is expressed in *Hong* v. *Acheson*, 110 F. Supp. 60 (N.D. Calif. 1953). There the Court held that inability to return to the United States by reason of factors beyond one's control did not expatriate. The Court stated:

> "Subdivision (g) (of 8 U.S.C. 601) in effect confers a citizenship which is subject to defeasance.
>
> . . . . . .
>
> The language of section 201(g) is not sufficiently definite to allow its application as a stop watch. Rights of citizenship are not to be destroyed by an ambiguity, *Perkins* v. *Elg, supra*, 307 U.S. 337, 59 S. Ct. 884, nor should such rights once conferred, be taken away without the clearest sort of justification and proof. *Schneiderman v. United States*, 320 U. S. 118. 122, 63 S. Ct. 1333, 87 L. Ed. 1796. Furthermore a restrictive proviso attached to a statute which provides for the acquisition of citizenship by derivation should be construed in a manner consistent with and ancillary to the paramount purpose of Congress to confer citizenship. *Acheson v. Albert*, 90 U.S. App. D.C. 294, 195 F. 2d 573.
>
> . . . . . .
>
> Section 401(a) of the Nationality Act of 1940 provides for the defeasance of American nationality of a child whose parents have become naturalized in a foreign state unless the child acquires permanent residence in

the United States by the time of attaining the age of twenty-three. Yet, that section has been held not to operate as to extinguish the nationality and citizenship of a person who is diligent in attempting to establish residence in the United States before attaining the specified age, but who is prevented from so doing by circumstances over which he has no control. *Repetto v. Acheson*, D.C.N.C. Cal., 94 F. Supp. 623."

Neither logic, Congressional history, location of the section in the statute, nor rules of statutory construction warrant the distinction made below. If circumstances over which one has no control prevent loss of citizenship of minors and naturalized citizens under expatriation sections of our citizenship laws, they likewise prevent such loss in the instant case.

3. The Courts below were of the opinion that Congress might impose arbitrary conditions upon the retention of citizenship granted by it (R. 48, 60). Citizenship through naturalization represents the grant of citizenship under Congressional limitations. Nevertheless, naturalized citizens may not be deprived of such rights (once granted) by arbitrary conditions such as foreign residence caused by factors beyond their control. *Mendelsohn* v. *Dulles*, 207 F. 2d 37 (C.A.D.C. 1953). Expatriation provisions applying to Americans who remain abroad too long are tolled by war conditions, lack of transportation and the absence of consular facilities. *Perri* v. *Dulles*, 206 F. 2d 586 (C.A. 3, 1935); *Peduzzi* v. *Brownell*, 113 F. Supp. 419 (D.C. Dist. of Col. 1953). A similar doctrine should prevail with regard to minors who acquire American citizenship under 8 U.S.C. 601(g) and are unable to proceed to the United States by reason of factors beyond their control. Otherwise, these minor children are being subjected to an arbitrary change

of citizenship and a "change of citizenship cannot be arbitrarily imposed." *MacKenzie* v. *Hare*, 239 U.S. 299 (1915); *Dos Reis ex rel. Camara* v. *Nicolls*, 161 F. 2d 860 (C.A. 1, 1947); *U. S. ex rel. Baglivo* v. *Day*, 28 F. 2d 44 (S.D.N.Y. 1928); *McCampbell* v. *McCampbell*, 13 F. Supp. 847 (W.D. Ky. 1936); *U.S. ex rel. Fracassi* v. *Karnuth*, 19 F. Supp. 581 (W.D.N.Y. 1937).

4. Subsection (c) of Section 301 of the 1952 Immigration and Nationality Act [8 U.S.C. 1401(c)] provides that subsection (b) which extends the age limitation from sixteen years to twenty-three "shall apply to a person born abroad subsequent to May 24, 1934." A proviso is added that nothing in the subsection shall "alter or affect" the citizenship of one who has complied or is complying with the previous statute (8 U.S.C. 601g) and has already entered the United States. Plainly, the proviso does not affect plaintiff who has not entered the United States. However, the Court below restricts the extension from sixteen to twenty-three years solely to those who have entered the United States (R. 62). This limitation is plainly contrary to the statutory language. Section 301 of the Immigration and Nationality Act (8 U.S.C. 1401-c) by its specific terms grants an extension to their twenty-third birthday to children born abroad subsequent to May 24, 1934, as petitioner was. There is no requirement that they enter the United States prior to their sixteenth birthday in order to secure the benefits of the extension. On the contrary, the extension avoided such requirement. Under its terms, which should be liberally construed in favor of citizenship, *Acheson* v. *Albert*, 195 F. 2d 573 (C.A.D.C. 1952), petitioner's citizenship should not be declared forfeit. The savings clause of the 1952 Act relied upon by the District Court (R. 49) but not by the Court of Appeals, specifically yields wherever it is "otherwise expressly provided in this Act," 8 U.S.C. 1101(c) Note.

The subsection extending the age to twenty-three *expressly* provides that it shall apply, as here, to those born subsequent to May 23, 1934.

Conclusion

The importance of the issue of citizenship presented here, the effect of this test case upon thousands of similar ones, and the conflict the decision below produces with established principles relating to loss of citizenship, are factors which we believe warrant the grant of a writ of certiorari.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT

(Caption—5645)

DECISION.

(Filed Aug. 3, 1955. Dale E. Iblenfeldt, Clerk.)

This matter is before the Court on motions of both parties for summary judgment. The action is brought for a declaratory judgment for citizenship under 8 U.S.C.A. 903, etc. The relief prayed for is: (1) a declaration that the plaintiff is and since birth has been a citizen and national of the United States; (2) directing defendant to issue a certificate of identity to enable plaintiff to obtain transportation to the United States and appear in person to prosecute this action; (3) directing defendant to issue to plaintiff as a citizen a passport or adequate authority to travel to the United States; and (4) redressing the deprivation by defendant of plaintiff's right as a citizen to enter the United States.

The father of the plaintiff was born in the United States but returned to China where he subsequently married. Four children were born of the marriage, the plaintiff being the eldest. Lee You Fee was born on the 16th of July, 1935. The father returned to the United States, and it is alleged that due to war conditions and his financial condition has been unable to return to Hong Kong where the plaintiff now resides. Plaintiff's 16th birthday fell on July 16, 1951. He did not apply for the necessary travel papers to come to the United States until after that date. On December 11, 1951, the plaintiff was formally informed by the American Consulate at Hong Kong that he was no longer a United States citizen and that travel papers would not be issued to him. The basis of that decision was the fact that the plaintiff had not arrived in the United States prior to his 16th birthday as is prescribed by Title 8, U.S.C.A., Section 601, which provides:

"* * * That, if the child has not taken up a residence in the United States or its outlying possessions by the time

he reaches the age of sixteen years, or if he resides abroad for such a time that it becomes impossible for him to complete the five years' residence in the United States or its outlying possessions before reaching the age of twenty-one years, his American citizenship shall thereupon cease." Plaintiff claims (1) that the passage of his 16th birthday did not defeat his claim to United States citizenship because of the alleged fact that he was unable to arrive in the United States because of circumstances beyond his control, namely, the Second World War, the unsettled conditions in China and Hong Kong, and the inability of his father to raise sufficient funds for his transportation; (2) that the statute in question was tolled by the Second World War because of the fact that the Consulate at Hong Kong was closed for a period of five years and twenty-four days; (3) that a foreign-born citizen cannot be involuntarily deprived of his citizenship; (4) that the Immigration Act of 1952, 8 U.S.C.A. 1401, which designates twenty-three years of age as the cut-off point for loss of citizenship, applies to the plaintiff's situation; and (5) that a determination by the United States Immigration and Naturalization Service that the plaintiff was a citizen of the United States rendered on October 8, 1951, is res adjudicata.

1

Title 8, U.S.C.A. 601, which is the statute applicable under these facts, is clear on its face. It makes no exceptions in circumstances of hardship, nor does it provide for any kind of administrative adjustment in cases where a foreign-born citizen, such as the plaintiff, is faced with lack of funds or sickness. It seems that if Congress had wished to make any exceptions, it would have included them in the law which it enacted. Any exceptions to this statute were for Congress to enact, not for the Court to "interpret."

Plaintiff in his brief cited *Lee Bang Hong* v. *Acheson*, 110 F. Supp. 48, and *Lee Hong* v. *Acheson*, 110 F. Supp. 60, as examples of decisions which held that foreign-born citizens did not lose citizenship through their failure to arrive in the United States by their 16th birthdays. Both of these

cases involve facts which showed that the minors had made timely application for travel papers and that the only reason they did not reach the United States in time to begin their residence was because of unnecessary delay by consulate officials.

2

Plaintiff has been unable to produce authority directly holding that the statute in question should be tolled and the Court has found none. Apparently the issue has never been decided. Plaintiff in his brief cites the *Perri* v. *Dulles*, 206 F. 2d 586, and *Peduzzi* v. *Brownell*, 113 F. Supp. 419, cases which held that Section 191(a) of the Nationality Act of 1942 was tolled during the Second World War. Section 401(a) of that Act provided that one who acquired citizenship abroad through a naturalized parent was required to come to the United States within two years or lose his citizenship. In both of these cases the plaintiffs were unable to return to the United States because the Second World War was being waged during most of that period. It should be noted that the Second World War did not directly interfere with Lee You Fee's coming to the United States before he was sixteen years old. The limitation did not occur during a war as it did in the cases just cited.

The Court feels that the conditions imposed upon foreign-born citizens in order to retain their citizenship is a matter within the discretion of Congress. I find no compelling reason why the statute in question should be tolled.

Plaintiff has not provided any persuasive authority on this contention. Cases relied on by the plaintiff are almost wholly under the Expatriation Act, and thus, clearly not in point under the statute. Had the plaintiff acquired his nationality by birth within the borders of the United States or were he a naturalized citizen, our determination might be otherwise. Plaintiff acquired his citizenship under an Act of Congress. Congress has full authority to place such limitations on that type of citizenship as it sees fit.

4.

The Immigration Act of 1952, 8 U.S.C.A. 1401, states that subsection (b) shall apply to a person born abroad

subsequent to May 24, 1934. Section 405(c) of the same Act provides that the Act shall not terminate nationality heretofore lawfully acquired nor restore nationality heretofore lost under any law of the United States. Therefore, it seems clear that the Act of 1952 will not avail anything for the plaintiff since under the terms of the Act of 1940 his citizenship had lapsed.

5.

The determination of the United States Immigration and Naturalization Service that the plaintiff was a citizen of the United States after the passage of his 16th birthday is not res adjudicata in this action. *In re Wing*, 124 F. Supp. 492, involves these facts: One Thin was originally admitted to the United States as a citizen in 1914. He made several trips back to China, the land of his birth. The fourth time he attempted to enter the United States he was detained for a hearing on alienage. The Court held:

"A prior administrative declaration of citizenship is not res adjudicata on the question of alienage, and if a person seeking entry is found to be an alien he may be excluded even though previously admitted as a citizen."

Plaintiff in his complaint raises a number of constitutional questions. Plaintiff claims that if subsections (g) and (h), 8 U.S.C.A. 601, exclude him from United States citizenship, that to that extent they are unconstitutional. He then proceeds to enumerate four ways in which the Constitution is allegedly violated. In plaintiff's original brief, he covered the Constitutional issues very sketchily. The Court then asked for supplementary briefs specifically on the constitutional issues raised. Plaintiff again avoided discussion of the particular violations alleged on the complaint. We, therefore, deem that the plaintiff has abandoned his claim of the unconstitutionality of 8 U.S.C.A. 601(g) and (h).

"It has been held that where both parties file motions for summary judgment, they concede, for the purpose of determination of their respective motions, that there are no issues of fact. But it has also been said that this does not require the court to determine that no fact issue exists, for it does not necessarily follow that there is no issue of

material fact merely because both move for summary judgment. In reaching its determination, the court may accept all allegations well and sufficiently pleaded as true or at their face value." 10 Nichols Cyc. Fed. Procedure, Sec. 35.22.

Plaintiff has alleged many extenuating circumstances as to why he did not take up residence in the United States before his 16th birthday. Lack of proper financing and troubled world conditions were among the difficulties enumerated. It should be pointed out that plaintiff had access to the Hong Kong Consulate from 1946 to 1951, and yet made no effort to obtain travel papers until after his 16th birthday. I have considered the possibility that there might be an issue of fact involved in this case, because of the plaintiff's alleged inability to leave Hong Kong for the United States. The facts alleged and taken as true in this case present a factual situation much different from the factual situations in *Lee Bang Hong* v. *Acheson, supra,* and *Lee Hong* v. *Acheson, supra.* If the plaintiff were to sustain the claim that lack of proper finances was one of the reasons why he did not take up residence in the United States before his 16th birthday, he still would not be entitled to relief as this Court interprets the law. The issue would be concerning an immaterial fact.

Plaintiff's motion for summary judgment is denied. The motion of the defendant for summary judgment is granted. Defendant's counsel will prepare order for judgment, submitting it to plaintiff's counsel for approval as to form only.

Dated, Milwaukee, Wisconsin, this 3rd day of August, 1955.

K. P. Grubb,
U. S. District Judge.

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, SEPTEMBER TERM AND SESSION, 1956

No. 11639

LEE YOU FEE, by LEE Q. PON, his next friend,
Plaintiff-Appellant,

v.

JOHN FOSTER DULLES, as Secretary of State,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Wisconsin.

September 26, 1956

Before DUFFY, *Chief Judge*, MAJOR and SWAIM, *Circuit Judges.*

SWAIM, *Circuit Judge.* The plaintiff, Lee You Fee, by his next friend, Lee Q. Pon, his father, brought this action against the Secretary of State of the United States for a judgment declaring that the plaintiff is now and has been since birth a citizen and national of the United States, and directing the defendant to issue to the plaintiff a certificate of identity and other necessary papers which would constitute authorization to the plaintiff to travel and obtain transportation to the United States to enable plaintiff to present himself at an official port of entry of the United States to apply for entry therein.

The facts in this case are not disputed. Plaintiff was born in China on July 16, 1935, of a Chinese mother and a father who was a citizen of the United States. Plaintiff's father has been a permanent resident of the United States since 1926 and since 1936 has had his permanent residence in Milwaukee, Wisconsin. Plaintiff's grandfather was born in the United States. Plaintiff's father was born in China but came to the United States as a youth. He later visited in China where he was married to plaintiff's mother. In 1936 plaintiff's father returned to the United

States and during that year the plaintiff was taken by his mother from the province in China where he was born to the British Crown Colony of Hong Kong where he has since resided. On March 3, 1945, plaintiff's mother died and plaintiff thereafter was under the care of relatives of his mother.

The plaintiff insists that he and his father have made diligent efforts to bring plaintiff to the United States prior to his sixteenth birthday but that plaintiff was prevented from so coming to the United States by circumstances beyond his control. Those circumstances were that during World War II conditions were unsettled in China and in Hong Kong, and that neither the plaintiff nor his father could raise sufficient funds for plaintiff's transportation to the United States.

The District Court found that plaintiff's sixteenth birthday fell on July 16, 1951; that prior to that time plaintiff had not made application for the necessary travel papers to come to the United States; and that thereafter the American Consulate at Hong Kong formally informed the plaintiff that he was no longer a citizen of the United States due to the fact that plaintiff had not come to the United States prior to his sixteenth birthday as required by 8 U.S.C.A. § 601 (1942 ed.). Section 601 provides:

"The following shall be nationals and citizens of the United States at birth:

* * * * * *

"(g) A person born outside the United States and its outlying possessions of parents one of whom is a citizen of the United States * * the other being an alien: *Provided*, That in order to retain such citizenship, the child must reside in the United States or its outlying possessions for a period or periods totaling five years between the ages of thirteen and twenty-one years: *Provided further*, That, if the child has not taken up a residence in the United States or its outlying possessions by the time he reaches the age of sixteen years * * * his American citizenship shall thereupon cease.

* * * * * *

"(h) The foregoing provisions of subsection (g) concerning retention of citizenship shall apply to a child born abroad subsequent to May 24, 1934." 8 U.S.C.A. § 601.

The Constitution confers citizenship only upon "persons born or naturalized in the United States and subject to the jurisdiction thereof." Amendment XIV, Section 1. Clearly the plaintiff cannot claim citizenship under this provision of the Constitution. Plaintiff must therefore rely only on the provisions of such Acts as the Congress has passed under the authority of the Constitution.

As shown above, the Nationality Act of 1940 granted citizenship at birth to a child born in a foreign country to parents one of whom was a citizen of the United States, with certain residence requirements, and the other an alien. But this grant of citizenship was clearly made subject to the conditions subsequent that a person so born, to retain citizenship, "must reside in the United States or its outlying possessions for a period or periods totaling five years between the ages of thirteen and twenty-one years" and, further, that "if the child has not taken up a residence in the United States or its outlying possessions by the time he reaches the age of sixteen years • • • his American citizenship shall thereupon cease."

The Constitution of the United States, in Article I, Section 8, confers on the Congress the power to establish a uniform rule of naturalization. So long as the rule so established is uniform Congress may provide such conditions as it sees fit. In *United States v. Wong Kim Ark*, 169 U.S. 649, 668, the Court said:

> "Nor can it be doubted that it is the inherent right of every independent nation to determine for itself, and according to its own constitution and laws, what classes of persons shall be entitled to its citizenship.
>
> "Both in England and in the United States, indeed, statutes had been passed at various times enacting that certain issue born abroad of English subjects, or of American citizens, respectively, should inherit, to some extent at least, the rights of their parents."

In the instant case the plaintiff was granted American citizenship at birth subject to the provision of the law that citizenship would be lost by his failure to comply with the stipulated conditions. The plaintiff did fail to comply with these conditions and pursuant to the law he ceased to be a citizen of the United States.

As the trial judge pointed out, the 1940 statute, 8 U.S.C.A. § 601, made no exception, based on circumstances of hardship, to the requirement that a person, in a situation such as the plaintiff, in order to retain his citizenship was required to take up residence in the United States or its outlying possessions by the time he reached the age of sixteen years.

The plaintiff has cited two District Court decisions, *Lee Bang Hong* v. *Acheson*, 110 F. Supp. 48, and *Lee Hong* v. *Acheson*, 110 F. Supp. 60, and a decision of this court, *Lee Wing Hong* v. *Dulles*, 7 Cir., 214 F. 2d 753, as supporting his contention that his citizenship was not lost by his failure to establish residence in the United States prior to his sixteenth birthday. But in each of those cases the plaintiff had made timely application and in each case the plaintiff's failure to reach the United States prior to his sixteenth birthday was due to the tardiness and unnecessary delay by officials of the consular office in issuing to the plaintiff the necessary travel orders. Certainly the Government should not be heard to contend that a plaintiff had been deprived of his citizenship because of the failure of the plaintiff to do something which the officials of the Government had carelessly or wilfully prevented his doing. In the instant case the plaintiff did not make any application to come to the United States until after his citizenship had been lost because of his failure to comply with the condition that he establish his residence in the United States prior to his sixteenth birthday.

The plaintiff herein also insists that "Subsections (g) and (h) of section 201 of the 1940 Nationality Act (8 U.S.C.A. 601 (g) and (h)) are part and parcel of the expatriation provisions of such Act which also included section 400 to 410 thereof. Sections 400 to 410 of the 1940 Nationality Act, 8 U.S.C.A. §§ 800 to 810, deal only with expatriation.

These sections recognize the right of expatriation as a natural and inherent right of all people; define how a person who is a citizen of the United States by birth or naturalization shall lose his nationality; define certain actions of the citizen which shall constitute a presumption of expatriation; and define how such presumption of expatriation may be overcome by furnishng satisfactory evidence. Section 403 of the Act provides that no national under eighteen years of age can expatriate himself by performing some of the acts which Section 401 provides shall be expatriating acts if performed by a person who is eighteen years of age or over. The plaintiff here argues that since some of the expatriation cases hold that a citizen may not be expatriated unless he voluntarily performs the acts of expatriation and that a minor's act is not a voluntary act in the sense required to effect his expatriation the same rules should be followed in the instant case in determining whether or not the plaintiff has lost his citizenship.

However, as we have pointed out above, the sections of the Nationality Act on the two subjects, expatriation and acquiring citizenship at birth in a foreign country where only one of the parents is a United States citizen, are entirely different. The expatriation part of the Act describes what voluntary acts on the part of a citizen shall constitute renunciation of his citizenship, while that part of the Act upon which the plaintiff depends grants citizenship to a foreign born person subject to the provision that his citizenship may be retained only on the condition that he take up residence in the United States by the time he reaches the age of sixteen years and that if he fails to do so his citizenship shall thereupon cease. The Congress need not have made and did not make any exceptions to this condition.

The plaintiff also relies strongly on subsection (b) of Section 301 of the Immigration and Nationality Act of 1952; 8 U.S.C.A. § 1401, *et seq.*, as operating to restore his citizenship. Subsection (a)(7) of Section 301 states: "a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United

States * * *" shall be a national and a citizen of the United States at birth. But subsection (b) of this same section provides that:

> "Any person who is a national and citizen of the United States at birth under paragraph (7) of subsection (a) of this section, shall lose his nationality and citizenship unless he shall come to the United States prior to attaining the age of twenty-three years and shall immediately following any such coming be continuously physically present in the United States for at least five years: *Provided*, That such physical presence follows the attainment of the age of fourteen years and precedes the age of twenty-eight years." 8 U.S.C.A. § 1401(b).

Section 405(c) of the Immigration and Nationality Act of 1952 provides that:

> "Except as otherwise specifically provided in this Act, the repeal of any statute by this Act shall not terminate nationality heretofore lawfully acquired nor restore nationality heretofore lost under any law of the United States or any treaty to which the United States may have been a party."

The 1952 Act in Section 353(10) did specifically provide that subsections (b) and (c) of Section 404 of the Nationality Act of 1940 should not be held to be or to have been applicable to persons who had, by an Act of Congress or by treaty, United States nationality solely by reason of former nationality and birth or residence in an area outside the continental United States. Section 354(1) of the Nationality Act, as amended in 1952, also provides that Section 404(c) of the Nationality Act of 1940 should not be held to be or to have been applicable to veterans of World War II. 8 U.S.C.A. § 1486(1).

The plaintiff insists that subsection (b) of Section 301 of the Nationality Act of 1940, as amended in 1952, operated to restore his citizenship. This subsection only provides that a person who is a national and citizen of the United

States at birth under paragraph 7 of Section 301 shall lose his citizenship unless he complies with certain requirements of residence in the United States.

Subsection (c) of Section 301 of the 1952 Nationality Act, 8 U.S.C.A. § 1401(c), provides that:

> "Subsection (b) of this section shall apply to a person born abroad subsequent to May 24, 1934: *Provided, however,* That nothing contained in this subsection shall be construed to alter or affect the citizenship of any person born abroad subsequent to May 24, 1934, who, prior to the effective date of this chapter, has taken up a residence in the United States before attaining the age of sixteen years, and thereafter, whether before or after the effective date of this chapter, complies or shall comply with the residence requirements for retention of citizenship specified in subsections (g) and (h) of section 201 of the Nationality Act of 1940, as amended."

It would seem clear that this language cannot properly be construed to restore plainiff's citizenship which had been lost prior to the effective date of the 1952 Act because of plaintiff's failure to comply with the condition that in order to retain his citizenship he was required to come to the United States prior to his sixteenth birthday. Subsection (c) offers to a person who was born abroad subsequent to May 24, 1934, and *who, prior to the effective date of the 1952 Nationality Act, had taken up residence in the United States before attaining the age of sixteen years,* the choice of thereafter complying with the residence requirements for the retention of citizenship as specified in subsections (g) and (h) of Section 201 of the 1940 Nationality Act, as amended.

The judgment of the District Court is affirmed.

JUDGMENT

(September 26, 1956)

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Wisconsin, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED.



(2934-8)

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In the Supreme Court of the United States

OCTOBER TERM, ~~1956~~ 57

LEE YOU FEE, BY LEE Q. PON, HIS NEXT FRIEND,
Petitioner

v.

JOHN FOSTER DULLES, as SECRETARY OF STATE

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

MEMORANDUM FOR THE RESPONDENT

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 643

LEE YOU FEE, BY LEE Q. PON, HIS NEXT FRIEND,
Petitioner

v.

JOHN FOSTER DULLES, as SECRETARY OF STATE

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

MEMORANDUM FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the Court of Appeals (R. 56-62; Pet. App. 18-24) is reported at 236 F. 2d 885. The opinion of the district court (R. 47-51; Pet. App. 13-17) is reported at 133 F. Supp. 160.

JURISDICTION

The judgment of the Court of Appeals was entered on September 26, 1956 (R. 63). The petition for a

writ of certiorari was filed on December 21, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner, born in China of a United States citizen father, lost his citizenship under sections 201 (g) and (h) of the Nationality Act of 1940 by failure to apply for, or take up, residence in the United States prior to his sixteenth birthday on July 16, 1951, at which time the consulate in Hong Kong, where petitioner resided, had been receiving travel applications for five years.

2. Whether sections 301 (b) and (c) of the Immigration and Nationality Act of 1952, which permit retention of American citizenship by persons born abroad provided they come to the United States prior to their twenty-third birthday, was inapplicable to petitioner by reason of his previous loss of citizenship under sections 201 (g) and (h) of the Nationality Act of 1940.

STATUTES INVOLVED

Section 201 of the Nationality Act of 1940 (54 Stat. 1138; 8 U.S.C. 601 (1946 ed.)) provided:

> The following shall be nationals and citizens of the United States at birth:
>
> * * *
>
> (g) A person born outside the United States and its outlying possessions of parents one of whom is a citizen of the United States who, prior to the birth of such person, has had ten years' residence in the United States or one of its outlying possessions, at least five of which were

after attaining the age of sixteen years, the other being an alien: *Provided,* That, in order to retain such citizenship, the child must reside in the United States or its outlying possessions for a period or periods totaling five years between the ages of thirteen and twenty-one years: *Provided further,* That, if the child has not taken up a residence in the United States or its outlying possessions by the time he reaches the age of sixteen years, or if he resides abroad for such a time that it becomes impossible for him to complete the five years' residence in the United States or its outlying possessions before reaching the age of twenty-one years, his American citizenship shall thereupon cease.

* * *

(h) The foregoing provisions of subsection (g) concerning retention of citizenship shall apply to a child born abroad subsequent to May 24, 1934.

The above provisions were repealed by section 403(a) of the Immigration and Nationality Act of 1952, 66 Stat. 279, 280.

Section 301 of the Immigration and Nationality Act of 1952 (66 Stat. 235; 8 U.S.C. 1401) provides as follows:

(a) The following shall be nationals and citizens of the United States at birth:

* * *

(7) a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or

periods totaling not less than ten years, at least five of which were after attaining the age of fourteen years: *Provided,* That any periods of honorable service in the Armed Forces of the United States by such citizen parent may be included in computing the physical presence requirements of this paragraph.

(b) Any person who is a national and citizen of the United States at birth under paragraph (7) of subsection (a), shall lose his nationality and citizenship unless he shall come to the United States prior to attaining the age of twenty-three years and shall immediately following any such coming be continuously physically present in the United States for at least five years: *Provided,* That such physical presence follows the attainment of the age of fourteen years and precedes the age of twenty-eight years.

(c) Subsection (b) shall apply to a person born abroad subsequent to May 24, 1934: *Provided, however,* That nothing contained in this subsection shall be construed to alter or affect the citizenship of any person born abroad subsequent to May 24, 1934, who, prior to the effective date of this Act has taken up a residence in the United States before attaining the age of sixteen years, and thereafter, whether before or after the effective date of this Act, complies or shall comply with the residence requirements for retention of citizenship specified in subsections (g) and (h) of section 201 of the Nationality Act of 1940, as amended.

Section 405(c) of the Immigration and Nationality Act of 1952 (66 Stat. 280; 8 U.S.C. 1101 note) provides as follows:

Except as otherwise specifically provided in this Act, the repeal of any statute by this Act shall not terminate nationality heretofore lawfully acquired nor restore nationality heretofore lost under any law of the United States or any treaty to which the United States may have been a party.

STATEMENT

Petitioner filed in the United States District Court for the Eastern District of Wisconsin a complaint for declaratory judgment seeking recognition of alleged United States citizenship (R. 2-13). The substance of the petition was as follows:

Petitioner was born in China on July 16, 1935, of a Chinese mother and a father who was a citizen of the United States (R. 3, 4, 6). In 1936 petitioner's father returned to the United States where he had permanent residence in Milwaukee, Wisconsin (R. 4). Petitioner's mother died on March 3, 1945, and he was left under the care of her relatives at Hong Kong (R. 5, 57).

From December 7, 1941, through December 26, 1946, the United States Consulate at Hong Kong was closed to applications for travel papers for the purpose of coming to the United States (R. 4). Petitioner alleged that because of conditions beyond his control he was prevented from making application for travel to the United States before his sixteenth birthday on July 16, 1951. These conditions were said to include unsettled post-war emergency conditions in Hong Kong, and the inability of petitioner and his father to raise funds for his trip to the United States (R. 8-9, 31-32). On October 17, 1951, and again on December 11, 1951, petitioner's application for travel to the United States was disapproved by the con-

sulate at Hong Kong on the ground that it had not been timely filed before petitioner's sixteenth birthday (July 16, 1951), and he had lost his United States citizenship (R. 8-9).

On motions for summary judgment the district court dismissed the complaint (R. 25-26, 41, 52). The decision (Pet. App. 13-17) was to the effect that, under sections 201 (g) and (h) of the Nationality Act of 1940 (*supra*, pp. 2-3), petitioner had lost his American citizenship by failing to take up residence in the United States prior to his sixteenth birthday, and that the limitation of the statute was not tolled by lack of proper financing or troubled world conditions. On appeal (R. 53) the Court of Appeals affirmed (Pet. App. 18-25).

DISCUSSION

1. There can be little question but that petitioner lost his right to citizenship under sections 201 (g) and (h) of the Nationality Act of 1940 (*supra*, pp. 2-3) by reason of failure to apply for, or take up, residence in the United States prior to reaching the age of 16 years on July 16, 1951. The 1940 Act granted citizenship at birth to a child born in a foreign country if one parent was a United States citizen and certain residence requirements were met. This grant of citizenship, however, was not absolute but subject to the conditions subsequent that such a person, in order to achieve "retention" of his citizenship, "must reside in the United States or its outlying possessions for a period or periods totaling five years between the ages of thirteen and twenty-one years," and that "if the child has not taken up a residence in the United States or its outlying possessions by the time he reaches

the age of sixteen years * * * his American citizenship shall thereupon cease." Petitioner did not comply with these conditions subsequent and therefore lost his citizenship, since it is undisputed that he did not establish a residence in this country prior to his sixteenth birthday, and did not even apply for travel facilities before that date.

The issue which petitioner attempts to raise, as to whether the requirement for taking up United States residence prior to the sixteenth birthday may be tolled where conditions beyond the child's control make it impossible for him to comply with the statute, is not presented by this case. Petitioner, his father, and his mother's relatives had ample opportunity from 1946 to 1951 to petition the Hong Kong Consulate for travel papers in order to keep alive his claim for retention of citizenship. Even if they did not have sufficient finances for a trip in 1946, they could at least have made application for travel documents, with the hope of raising money later. Petitioner's failure to make any timely application for travel to the United States was not involuntary in any real sense of the word. Moreover, the fact that the United States Consulate in Hong Kong was closed to applications for travel to the United States between December 1941 and December 1946, while petitioner was between the ages of *six* and *eleven*, certainly could not relieve him of the statutory requirement that he reach the United States prior to his sixteenth birthday. It should also be noted that under the 1940 Act the five years' residence in the United States had to occur after the age of thirteen.

Petitioner's strong reliance upon *Lee Hong* v. *Acheson*, 110 F. Supp. 60 (N.D. Cal), is misplaced.

There, completely unlike the situation here, plaintiff made application to the American Consulate at Hong Kong "for travel documents more than five months prior to his sixteenth birthday," but by reason of the State Department's unwarranted delay they "were issued only 37 hours prior to the beginning of the day on which plaintiff would attain the age of sixteen" (110 F. Supp. at 63). For these reasons it was held that the plaintiff had substantially complied with section 201(g) by making a bona fide attempt to take up timely residence in the United States.

Petitioner also relies upon *Perri* v. *Dulles*, 206 F. 2d 586 (C.A. 3), and *Peduzzi* v. *Brownell*, 113 F. Supp. 419 (D. D.C.), arising under section 401(a) of the Nationality Act of 1940, which provides that an American child who acquires foreign nationality through a naturalized parent is required to come to the United States within two years after majority or lose his American citizenship. In each of these cases, however, the statute was deemed tolled since World War II was being waged and consulates were closed during most of the pertinent time interval. Furthermore, a short two-year statute, instead of the much longer period provided in section 201(g), was involved. As the district court appropriately observed here (Pet. App. 15), "It should be noted that the Second World War did not directly interfere with [petitioner's] coming to the United States before he was sixteen years old."

2. The real issue in this case is whether, although petitioner had lost his citizenship under the 1940 Act, section 301(b) and (c) of the 1952 Act (*supra*, p. 4.) gave him an opportunity to regain that

citizenship by coming to the United States before he was twenty-three years of age. Section 301(c) of the 1952 Act states that the rule as to losing citizenship unless one has come to the United States prior to attaining the age of twenty-three "shall apply to a person born abroad subsequent to May 24, 1934" (as was petitioner). However, section 405(c) of the 1952 Act provides:

> Except as otherwise specifically provided in this Act, the repeal of any statute by this Act shall not terminate nationality heretofore lawfully acquired nor restore nationality heretofore lost under any law of the United States or any treaty to which the United States may have been a party.

On the face of the statute, reading the two sections together, it would appear that, as the court below held, section 405(c) operates to render inapplicable to petitioner, who had already lost his citizenship (in 1951) before the effective date of the 1952 Act (December 1952), the provisions of section 301(c). This Court's decision in *United States* v. *Menasche,* 348 U. S. 528, interpreting the savings clause in section 405(a) of the 1952 Act, indicates that, to come within the "except as otherwise specifically provided" proviso of a general savings clause, the section relied upon for the exception must clearly express that intention. See also *Wong Kay Suey* v. *Brownell,* 227 F. 2d 41 (C.A. D.C.), certiorari denied, 350 U. S. 969, where the court held that section 360(a) of the 1952 Act, which states that it is to apply to proceedings under "this or any other act," is not a clause which "otherwise specifically provided," so as to render inapplicable the general savings clause. Section 301(c), involved

here, seems to us to show on its face less purpose to render the savings clause of section 405(c) inapplicable than the sections involved in either *Menasche* or *Wong Kay Suey* as to the comparable savings clause of section 405(a).

There is, however, support in the legislative history for petitioner's position that section 301(b) and (c) of the 1952 Act were intended to be applicable to all children of an American citizen-parent born abroad after May 24, 1934. These provisions were originally recommended in the broad study of the working of the immigration and nationality laws represented by Senate Report 1515, 81st Congress, 2d Session, which was filed by the Senate Committee on the Judiciary on April 20, 1950. At that time, no child born after May 24, 1934, could yet have lost his citizenship by failure to take up residence before his sixteenth birthday. The committee report stated, p. 713:

> The subcommittee finds that the provisions of existing law relative to citizenship of children born abroad of a citizen parent or parents are confusing and difficult to administer and interpret, particularly with reference to residence requirements, both of parents and children.
>
> *Inasmuch as* adjudication and *determination of cases coming under the provisions of existing law have not yet begun,* the subcommittee recommends that the proposed new law be made *retroactive* to include children born abroad subsequent to May 24, 1934, which is the date used in the 1940 act. [Emphasis added.]

In the intervening two years, during which this recommendation was carried over in various bills which finally became the Immigration and Nationality

Act of 1952, no mention was made of the fact that the situation had changed and that some children born after 1934 could have (and, like petitioner, had) lost citizenship before the 1952 Act became effective. But some further support is given petitioner's position by the detailed analysis and comment prepared by the Immigration and Naturalization Service, to which reference is made in Senate Report 1137, 82d Congress, 2d Session, p. 3, and House Report 1365, 82d Congress, 2d Session, pp. 27-28. This analysis from the Immigration and Naturalization Service states, at page 301-5:

> Although subsection (b) refers specifically to persons born abroad *who are citizens* under paragraph (7) of subsection (a), the apparent effect of subsection (c) is to apply the rules for retention of citizenship contained in subsection (b) to *all persons* born abroad subsequent to May 24, 1934. [Emphasis added.]

No express language was written into the Act to restore the citizenship which was lost between the time of Senate Report 1515 (in April 1950) and the effective date of the Act (in December 1952). Strictly construed, the provision of section 301(c) (*supra*, p. 4) that the new rule as to *losing* citizenship shall apply to a person born after May 24, 1934, says nothing about *restoring* citizenship already lost.

The history of the savings clause in section 405(c) fails to throw any light on the subject. All the bills introduced had some similar form of savings clause, but the introductory phrase of the final draft, *i.e.*, the "except as otherwise specifically provided" clause, was not inserted until the conference. House Report

2096, 82d Congress, 2d Session. No explanation appears in the reports or debate.[1]

The issue thus becomes whether the intention expressed in Senate Report 1515 in 1950 can be said to bring section 301(b) and (c) of the 1952 Act within the "except as * * * specifically provided" clause of section 405(c). The government in *Menasche* and *Wong Kay Suey* took the position, and it is currently taking the position in *Lehmann* v. *Carson*, No. 72, this Term, and *Mulcahey* v. *Catalanotte*, No. 435, this Term (as to section 241(d) relating to grounds of deportation), that the determination of whether a particular section comes within the "otherwise specifically provided" clause of a general saving clause, requires not any particular form of language, but rather only a clear expression of congressional purpose. Should this view be adopted, there would be substantial (though not conclusive) grounds for holding that section 301(c) should be construed as making the more liberal terms of the 1952 Act available to all persons born after May 24, 1934, including those who lost their citizenship between May 24, 1950, and December 24, 1952, the effective date of the 1952 Act.

Since, however, the language of section 301(b) and (c) does not have the explicit wording which may be required by the *Menasche* and *Wong Kay Suey* opinions—and in fact is not as specific as the language

---

[1] It cannot be assumed that the phrase "except as otherwise specifically provided" was inserted in section 405(c) solely to take care of persons whose citizenship was to be restored by section 301(c), since it appears that citizenship was to be restored under at least one other provision, section 354(1).

involved in Nos. 72 and 435—we suggest that the Court may wish to withhold disposition of this case until it has passed upon Nos. 72 and 435.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1957

LEE YOU FEE, BY LEE Q. PON, HIS NEXT FRIEND,
PETITIONER

v.

JOHN FOSTER DULLES, AS SECRETARY OF STATE

WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 58

LEE YOU FEE, BY LEE Q. PON, HIS NEXT FRIEND,
PETITIONER

v.

JOHN FOSTER DULLES, AS SECRETARY OF STATE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the Court of Appeals (R. 56–62) is reported at 236 F. 2d 885. The opinion of the District Court is reported at 133 F. Supp. 160.

JURISDICTION

The judgment of the Court of Appeals was entered on September 26, 1956 (R. 63). The petition for a writ of certiorari was filed on December 21, 1956. The petition was granted on June 10, 1957 (R. 64). 354 U. S. 908. The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether petitioner, born in China of a United States citizen father, lost his citizenship under Sec-

tions 201 (g) and (h) of the Nationality Act of 1940 by failure to apply for, or take up, residence in the United States prior to his sixteenth birthday on July 16, 1951, at which time the consulate in Hong Kong, where petitioner resided, had been receiving travel applications for five years.

2. Whether Sections 301 (b) and (c) of the Immigration and Nationality Act of 1952, which permit retention of American citizenship by persons born abroad subsequent to May 24, 1934, provided they come to the United States prior to their twenty-third birthdays, are applicable to petitioner.

STATUTES INVOLVED

Section 201 of the Nationality Act of 1940 (54 Stat. 1138; 8 U. S. C. 601 (1946 ed.)) provided in pertinent part:

> The following shall be nationals and citizens of the United States at birth:
>
> * * * * *
>
> (g) A person born outside the United States and its outlying possessions of parents one of whom is a citizen of the United States who, prior to the birth of such person, has had ten years' residence in the United States or one of its outlying possessions, at least five of which were after attaining the age of sixteen years, the other being an alien: *Provided,* That, in order to retain such citizenship, the child must reside in the United States or its outlying possessions for a period or periods totaling five years between the ages of thirteen and twenty-one years: *Provided further,* That, if the child has not taken up a residence in the United States or its outlying possessions by the time

he reaches the age of sixteen years, or if he resides abroad for such a time that it becomes impossible for him to complete the five years' residence in the United States or its outlying possessions before reaching the age of twenty-one years, his American citizenship shall thereupon cease.

* * * * * *

(h) The foregoing provisions of subsection (g) concerning retention of citizenship shall apply to a child born abroad subsequent to May 24, 1934.

These provisions were repealed by Section 403 (a) of the Immigration and Nationality Act of 1952, 66 Stat. 279, 280.

Section 301 of the Immigration and Nationality Act of 1952 (66 Stat. 235; 8 U. S. C. 1401) provides as follows:

(a) The following shall be nationals and citizens of the United States at birth:

* * * * * *

(7) a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than ten years, at least five of which were after attaining the age of fourteen years: *Provided*, That any periods of honorable service in the Armed Forces of the United States by such citizen parent may be included in computing the physical presence requirements of this paragraph.

(b) Any person who is a national and citizen of the United States at birth under paragraph (7) of subsection (a), shall lose his nationality and citizenship unless he shall come to the United States prior to attaining the age of twenty-three years and shall immediately following any such coming be continuously physically present in the United States for at least five years: *Provided,* That such physical presence follows the attainment of the age of fourteen years and precedes the age of twenty-eight years.

(c) Subsection (b) shall apply to a person born abroad subsequent to May 24, 1934: *Provided, however,* That nothing contained in this subsection shall be construed to alter or affect the citizenship of any person born abroad subsequent to May 24, 1934, who, prior to the effective date of this Act, has taken up a residence in the United States before attaining the age of sixteen years, and thereafter, whether before or after the effective date of this Act, complies or shall comply with the residence requirements for retention of citizenship specified in subsections (g) and (h) of section 201 of the Nationality Act of 1940, as amended.

Section 405 (c) of the Immigration and Nationality Act of 1952 (66 Stat. 280; 8 U. S. C. 1101 note) provides as follows:

Except as otherwise specifically provided in this Act, the repeal of any statute by this Act shall not terminate nationality heretofore lawfully acquired nor restore nationality heretofore lost under any law of the United States or any treaty to which the United States may have been a party.

STATEMENT

Petitioner filed in the United States District Court for the Eastern District of Wisconsin a complaint for declaratory judgment, seeking recognition of his alleged United States citizenship (R. 2–13). The substance of the complaint was as follows:

Petitioner was born in China on July 16, 1935, of a Chinese mother and a father who was a citizen of the United States (R. 3, 4, 6). In 1936, petitioner's father returned to the United States where he had permanent residence in Milwaukee, Wisconsin (R. 4). Petitioner's mother died on March 3, 1945, and he was left under the care of her relatives at Hong Kong (R. 5, 57).

From December 7, 1941, through December 26, 1946, the United States Consulate at Hong Kong was closed to applications for travel papers for the purpose of coming to the United States (R. 4). Petitioner alleged that because of conditions beyond his control he was prevented from making application for travel to the United States before his sixteenth birthday on July 16, 1951. These conditions were said to include unsettled post-war emergency conditions in Hong Kong, and the inability of petitioner and his father to raise funds for his trip to the United States (R. 8–9, 31–32). On October 17, 1951, and again on December 11, 1951, petitioner's application for travel to the United States was disapproved by the consulate at Hong Kong on the ground that it had not been timely filed before petitioner's sixteenth birthday (July 16, 1951), and he had lost his United States citizenship (R. 8–9).

On motions for summary judgment, the District Court dismissed the complaint (R. 25–26, 41, 52). The decision (R. 47–51) was to the effect that, under Sections 201 (g) and (h) of the Nationality Act of 1940 (*supra*, pp. 2–3), petitioner had lost his American citizenship by failing to take up residence in the United States prior to his sixteenth birthday (July 16, 1951), and that the limitation of the statute was not tolled by lack of proper financing or troubled world conditions. The District Court also held that the pertinent savings clause of the 1952 Act (Section 405 (c), *supra*, p. 4) was applicable, so that petitioner's citizenship, lost under the 1940 Act, remained lost and was not restored under Section 301 (b) of the 1952 Act, *supra*, p. 4.

On appeal, the Court of Appeals affirmed, holding that petitioner's citizenship, lost prior to the effective date of the 1952 Act, had not been restored by Sections 301 (b) and (c) of that Act; and that subsection (c) was limited to persons "born abroad subsequent to May 24, 1934, who, prior to the effective date of [the 1952 Nationality] Act, had taken up a residence in the United States [as petitioner had not] before attaining the age of sixteen years * * *."

SUMMARY OF ARGUMENT

I

Petitioner lost his American citizenship, under Sections 201 (g) and (h) of the Nationality Act of 1940 (*supra*, pp. 2–3), by reason of his failure to take up residence in the United States prior to his reaching the age of 16 years on July 16, 1951. The grant of citizenship in the 1940 Act was subject to the condi-

tions subsequent (a) that in order to retain his citizenship the child "must reside in the United States or its outlying possessions for a period or periods totaling five years between the ages of thirteen and twenty-one years", and (b) that "if the child has not taken up a residence in the United States or its outlying possessions by the time he reaches the age of sixteen years * * * his American citizenship shall thereupon cease". Since petitioner did not comply with either of these conditions he lost his citizenship.

There was no showing that the requirement for taking up United States residence prior to the sixteenth birthday was tolled because of conditions making it impossible for petitioner to comply with the statute. He and his relatives had ample opportunity from 1946 to 1951 to ask the Hong Kong Consulate for travel papers to keep alive his claim for retention of citizenship. The fact that this consulate was closed to applications for travel to the United States between December 1941 and December 1946, while petitioner was between the ages of six and eleven, could not relieve him of the statutory requirement that he reach the United States prior to his sixteenth birthday, or at least make the appropriate application after the consulate reopened in December 1946.

II

The real issue in the case is whether, although petitioner had lost his citizenship under the 1940 Act, Sections 301 (b) and (c) of the 1952 Act (*supra*, p. 4) gave him an opportunity to regain that citizen-

ship by coming to the United States before he was twenty-three years of age. We now believe that petitioner's position is correct and that our contrary position below was incorrect. Section 301 (c) states in terms that the new rule established by Section 301 (b) as to losing citizenship unless one has come to the United States prior to attaining the age of twenty-three "shall apply to a person born abroad subsequent to May 24, 1934." Petitioner was in fact "born abroad subsequent to May 24, 1934"—*i. e.*, he was born on July 16, 1935. Literally, the section covers his case.

The legislative history likewise supports petitioner's position that Sections 301 (b) and (c) were actually intended to be applicable to *all* children of an American citizen-parent born abroad after May 24, 1934. These provisions were originally recommended in Senate Report 1515, 81st Cong., 2d Sess., filed on April 20, 1950. At that time, no child born after May 24, 1934, could yet have lost his citizenship by failure to take up residence before his sixteenth birthday (although that possibility was only a month away). The committee report stated, p. 713:

> Inasmuch as adjudication and determination of cases coming under the provisions of existing law [*i. e.*, the 1940 Act] have not yet begun, the subcommittee recommends that the proposed new law be made retroactive to include children born abroad subsequent to May 24, 1934, which is the date used in the 1940 Act.

Further support is given petitioner's position by the detailed analysis and comment by the Immigration

and Naturalization Service on the proposed 1952 Act; at page 301–5 of that analysis, this statement is made:

> Although subsection (b) refers specifically to persons born abroad who are citizens under paragraph (7) of subsection (a), *the apparent effect of subsection (c) is to apply the rules for retention of citizenship contained in subsection (b) to all persons born abroad subsequent to May 24, 1934.* [Emphasis added.]

On this view, the question becomes whether the language of Section 301 (c), applying Section 301 (b) to "a person born abroad subsequent to May 24, 1934", can in the light of its legislative history be said to be a clause which brings this case within the "except as otherwise specifically provided" portion of Section 405 (c)—a savings clause of the 1952 Act which provides against restoration of American nationality theretofore lost, "except as otherwise specifically provided in this Act." We think the language and legislative history of Section 301 (c) do sufficiently indicate a Congressional intent to cover all persons born after May 24, 1934, so that Section 301 (c) should properly be treated as a specific provision rendering the general savings clause inapplicable. The determination of whether a particular section comes within the "otherwise specifically provided" part of a general savings clause requires not any particular form of language, but rather only a clear expression of Congressional purpose. *Lehmann* v. *Carson*, 353 U. S. 685; *Mulcahey* v. *Catalanotte*, 353 U. S. 692.

DISCUSSION

I. PETITIONER LOST HIS UNITED STATES CITIZENSHIP, UNDER THE NATIONALITY ACT OF 1940, BY FAILING TO APPLY FOR, OR TAKE UP, RESIDENCE IN THE UNITED STATES PRIOR TO HIS SIXTEENTH BIRTHDAY

There can be little question, in our view, but that petitioner lost his United States citizenship under Sections 201 (g) and (h) of the Nationality Act of 1940 (*supra*, pp. 2–3) by reason of his failure to apply for, or take up, residence in the United States prior to his reaching the age of 16 years on July 16, 1951. The 1940 Act granted citizenship at birth to a child born in a foreign country if one parent was a United States citizen and certain residence requirements were met. This grant of citizenship, however, was not absolute but was subject to the conditions subsequent that (a) such a person, in order to achieve "retention" of his citizenship, "must reside in the United States or its outlying possessions for a period or periods totaling five years between the ages of thirteen and twenty-one years," and that (b) "if the child has not taken up a residence in the United States or its outlying possessions by the time he reaches the age of sixteen years * * * his American citizenship shall thereupon cease." Petitioner did not comply with these conditions and therefore lost his citizenship, since it is undisputed that he did not establish a residence in this country prior to his sixteenth birthday, and did not even apply for travel facilities before that date.[1]

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[1] For a discussion of these provisions of the 1940 Act, see Senate Report No. 1515, 81st Cong., 2d Sess. ("The Immigration and Naturalization Systems of the United States"), April 20, 1950, at pp. 690–691.

The issue which petitioner attempts to raise, as to whether the requirement for taking up United States residence prior to the sixteenth birthday may be tolled where conditions beyond the child's control make it impossible for him to comply with the statute, is not presented by this case. Petitioner, his father, and his mother's relatives had ample opportunity from 1946 to 1951 to petition the Hong Kong Consulate for travel papers in order to keep alive his claim for retention of citizenship. Even if they did not have sufficient finances for a trip in 1946, they could at least have made application for travel documents, with the hope of raising the money later. Petitioner's failure to make a timely application for travel to the United States was not involuntary in any real sense of the word, but was due to his own failure and that of his family. Moreover, the fact that the United States Consulate in Hong Kong was closed to applications for travel to the United States between December 1941 and December 1946, while petitioner was between the ages of *six* and *eleven*, certainly could not relieve him of the statutory requirement that he reach the United States prior to his sixteenth birthday, or excuse his failure to apply after the consulate reopened in December 1946. It should also be noted that under the 1940 Act the five years' residence in the United States had to occur after the age of thirteen.

Petitioner's strong reliance upon *Lee Hong* v. *Acheson*, 110 F. Supp. 60 (N. D. Cal), is misplaced. There, completely unlike the situation here, the plaintiff made application to the American Consulate at Hong Kong "for travel documents more than five

months prior to his sixteenth birthday," but by reason of the State Department's unwarranted delay they "were issued only 37 hours prior to the beginning of the day on which plaintiff would attain the age of sixteen" (110 F. Supp. at 63). For these reasons it was held that the plaintiff had substantially complied with Section 201 (g) of the 1940 Act by making a bona fide attempt to take up timely residence in the United States.

Petitioner also relies upon *Perri* v. *Dulles,* 206 F. 2d 586 (C. A. 3), and *Paduzzi* v. *Brownell,* 113 F. Supp. 419 (D. D. C.), arising under Section 401 (a) of the Nationality Act of 1940, which provides that an American child who acquires foreign nationality through a naturalized parent is required to come to the United States within two years after his majority or lose his American citizenship. In each of these cases, however, the statute was deemed tolled since World War II was being waged and consulates were closed during most of the pertinent time interval. Furthermore, a short two-year statute, instead of the much longer period provided in Section 201 (g), was involved. As the District Court appropriately observed here (R. 49), "It should be noted that the Second World War did not directly interfere with [petitioner's] coming to the United States before he was sixteen years old."

II. PETITIONER'S CITIZENSHIP WAS RESTORED BY SECTIONS 301 (b) AND (c) OF THE IMMIGRATION AND NATIONALITY ACT OF 1952

The real issue in this case is whether, although petitioner had lost his citizenship under the 1940 Act (Point I, *supra,* pp. 10–12), Sections 301 (b) and (c) of the 1952 Act (*supra,* p. 4) gave him an op-

portunity to regain that citizenship by coming to the United States before he was twenty-three years of age. We now believe that petitioner's position on this issue is correct and that our contrary position below was wrong.

A. Section 301 (c) of the 1952 Act states that the new rule, in Section 301 (b), as to losing citizenship unless one has come to the United States prior to attaining the age of twenty-three "shall apply to a person born abroad subsequent to May 24, 1934." Petitioner falls within the four corners of this provision since he was born on July 16, 1935, and will not attain his twenty-third birthday until July 16, 1958. However, Section 405 (c) of the 1952 Act also provides:

> Except as otherwise specifically provided in this Act, the repeal of any statute by this Act shall not terminate nationality heretofore lawfully acquired nor restore nationality heretofore lost under any law of the United States or any treaty to which the United States may have been a party.

On the face of the statute, reading the two sections together, it can reasonably be said that, as the court below held, Section 405 (c) operates to render inapplicable to petitioner—who had already lost his citizenship (in July 1951) before the effective date of the 1952 Act (December 1952)—the provisions of Section 301 (c), despite the literal terms of the latter provision.

The legislative history—which was unfortunately not presented to the court below—does, however, support petitioner's position that Sections 301 (b) and

(c) of the 1952 Act were intended to be applicable to *all* children of an American citizen-parent born abroad after May 24, 1934. These provisions were originally recommended in the broad study of the working of the immigration and nationality laws reported in Senate Report No. 1515, 81st Cong., 2d Sess. ("The Immigration and Naturalization Systems of the United States"), which was filed by the Senate Committee on the Judiciary on April 20, 1950. At that time, no child born after May 24, 1934, could yet have lost his citizenship by failure to take up residence before his sixteenth birthday, although that possibility was only a month away. The committee report stated, p. 713:

> The subcommittee finds that the provisions of existing law relative to citizenship of children born abroad of a citizen parent or parents are confusing and difficult to administer and interpret, particularly with reference to residence requirements, both of parents and children.
>
> *Inasmuch as adjudication and determination of cases coming under the provisions of existing law have not yet begun,* the subcommittee recommends that the proposed new law be made *retroactive* to include children born abroad subsequent to May 24, 1934, which is the date used in the 1940 act. [Emphasis added.]

In view of the closeness of the date of the report (April 20, 1950) to the first possible date for loss of citizenship under the 1940 Act (May 24, 1950), the reference in the report to the fact that "determination" of cases had not begun and the recommendation that the new provisions be made "retroactive" re-

flects, we think, an intention to apply the new rules to all persons born after 1934, even those who might otherwise lose citizenship under the provisions of the 1940 Act.

In the two years which intervened between Senate Report No. 1515 and the enactment of the Immigration and Nationality Act of 1952, no mention was made of the fact that some children born after 1934 could have (and, like petitioner, actually had) lost citizenship under the 1940 Act before the 1952 Act became effective. But further support is given petitioner's position by the detailed analysis and comment prepared by the Immigration and Naturalization Service, to which reference is made in Senate Report 1137, 82d Cong., 2d Sess., p. 3, and House Report 1365, 82d Cong., 2d Sess., pp. 27–28. This analysis from the Immigration and Naturalization Service states, at page 301–5:

> Although subsection (b) refers specifically to persons born abroad *who are citizens* under paragraph (7) of subsection (a), the apparent effect of subsection (c) is to apply the rules for retention of citizenship contained in subsection (b) to *all persons* born abroad subsequent to May 24, 1934. The latter date is the date of an act (48 Stat. 797) which for the first time applied conditions for the retention of citizenship in the case of a child born abroad to parents, each of whom is an alien. The rules for such retention in subsection (b) are different from those under sections 201 (g) and (h) of the 1940 Act and some persons will be in the process of fulfilling the 1940 rules when this bill takes effect. However, it appears from the lan-

guage of the proviso to subsection (c), that any person who was a citizen under the Act of May 24, 1934, and who has already commenced the necessary action for retention of citizenship specified in the relevant provisions of the 1940 Act, will be permitted to complete such action on his part without any loss of citizenship. [Emphasis added.]

This comment is directed primarily at the problem of those covered by the proviso to subsection (c) who were already in the process of meeting the residence requirements under the 1940 Act and who would, under that Act, complete those requirements at a date earlier than under the 1952 Act. Nevertheless, the statement that the apparent effect of subsection (c) is to apply the new rule to "*all* persons" would suggest that persons in petitioner's position came within the purview of subsection (c). While there is no specific indication that the problem of the limited group who had already lost citizenship (under the 1940 Act) since May 24, 1950, was in the minds of the legislators, it could also be said that, if the problem had occurred to anyone, he might well have thought, on the basis of the comments of the Immigration and Naturalization Service and of the Senate Judiciary Committee, that provision had been made for allowing such persons to remain citizens if they complied with the new, more liberal, requirements of the 1952 Act.

That the more liberal provisions of the 1952 Act were intended to become applicable is also attested by the fact that Congress has, over the years, consistently liberalized the provisions relating to retention of citizenship by a child born outside the United

States, one of whose parents is an American citizen. The Act of May 24, 1934, 48 Stat. 797, required such a child to come to the United States no later than his 13th birthday, if he wished to maintain his citizenship. The Nationality Act of 1940, 54 Stat. 1137, 1139, Sec. 201 (g), raised the age of coming to the United States to 16, and Section 201 (h) provided that the new requirements of Section 201 (g) "shall apply to a child born abroad subsequent to May 24, 1934"—thus covering all children previously governed by the 1934 Act. In its turn, the 1952 Act raised the age to 23. Thus, the Congress has revealed an increasingly liberal attitude toward such children born abroad.

B. On this view, the issue becomes whether the language of Section 301 (c), applying Section 301 (b) to a "person born abroad subsequent to May 24, 1934," can in the light of its legislative history be said to be a clause which brings this case within the "except as otherwise specifically provided" portion of Section 405 (c), the relevant savings clause quoted above at p. 13.

The history of the savings clause in Section 405 (c) fails to throw any light on the subject. All the bills introduced had some similar form of savings clause, but the introductory phrase of the final draft, *i. e.*, the "except as otherwise specifically provided" clause, was not inserted until the conference. House Report 2096, 82d Cong., 2d Sess. No explanation appears in the reports or debate. Also, it cannot be assumed that the phrase "except as otherwise specifically provided" was inserted in Section 405 (c) solely to take care of persons whose citizenship was to be restored by Sec-

tion 301 (c), since it appears that citizenship was to be restored under at least one other provision, Section 354 (1).

While neither the language nor the history of Sections 301 (c) and 405 (c) can be said to be conclusive on the problem, we think the terms and background of Section 301 (c)—as discussed above—do sufficiently indicate a Congressional intent to cover *all* persons born after May 24, 1934; so that that subsection should properly be treated as a specific provision rendering the savings clause in Section 405 (c) inapplicable. In *Mulcahey* v. *Catalanotte*, 353 U. S. 692, and *Lehmann* v. *Carson*, 353 U. S. 685, dealing with the savings clause in Section 405 (a) of the 1952 Act, the government took the position (as petitioner does here) that the determination of whether a particular section comes within the "otherwise specifically provided" part of a savings clause requires, not any particular form of language, but rather only a clear expression of Congressional purpose.[2] In both of those cases, this Court followed that suggestion and held that the savings clause was rendered inapplicable by specific provisions of Section 241 of the 1952 Act relating to new grounds for deportation of aliens. Similarly, in *Shomberg* v. *United States*, 348 U. S. 540, the Court held that provisions of Section 318 of the 1952 Act, rather than the savings clause, were controlling. In *Shomberg*, the Court took cognizance of a "congressional purpose" and an "intent [which

[2] See the government's briefs in *Catalanotte* (No. 435, O. T. 1956, pp. 12–16) and in *Lehmann* (No. 72, O. T. 1956, pp. 11–12).

was] plain enough" (at p. 545) and held, "We would be lax in our duty if we did not give recognition also to the congressional purpose to override the savings clause when other considerations were thought more compelling than the preservation of the status quo" (at pp. 547–548).[3] In the instant case, although the language of Sections 301 (b) and (c) is not as explicit as that in the sections involved in *Catalanotte, Lehmann,* and *Shomberg, supra,* it sufficiently discloses a Congressional purpose, revealed by the legislative history, to override the savings clause of Section 405 (c) so as to make the more liberal terms of the new Act available to all persons born after May 24, 1934, including those who had lost their citizenship between May 24, 1950, and December 24, 1952, the effective date of the 1952 Act.

CONCLUSION

For the reasons stated in Point II, *supra,* it is respectfully submitted that the judgment of the Court of Appeals was in error and should be reversed, and that the case should be remanded to the District Court.

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NOVEMBER 1957.

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[3] For cases holding the savings clause (rather than specific provisions of the 1952 Act) applicable, see *United States* v. *Menasche,* 348 U. S. 528; *Wong Kay Suey* v. *Brownell,* 227 F. 2d 41 (C. A. D. C.), certiorari denied, 350 U. S. 969.

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